

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 07-10066-RCL

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VINCENT DE GIOVANNI,
MARIETTE BARROS, and all others
similarly situated,

Plaintiffs,

v.

JANI-KING INTERNATIONAL, INC.,
JANI KING, INC. and
JANI-KING OF BOSTON, INC.,

Defendants.

* * * * *

MOTION HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

PYLE, ROME, LICHTEN, EHRENBERG &
LISS-RIORDAN, P.C. (By Shannon E. Liss-Riordan,
Esq., Hillary A. Schwab, Esq. and Alexander M.
Sugerman-Brozan, Esq.), 18 Tremont Street, Suite
500, Boston, Massachusetts 02108, on behalf of the
Plaintiffs

NIXON PEABODY LLP (By Arthur L. Pressman,
Esq.), 100 Summer Street, Boston, Massachusetts
02110

- and -

NIXON PEABODY LLP (By Christopher M. Mason,
Esq.), 437 Madison Avenue, New York, New York
10022 on behalf of the Defendants

1 Courthouse Way
Boston, Massachusetts

May 21, 2009

1 **THE CLERK:** Calling Civil Action 07-10066,
2 DeGiovanni v. Jani-King.

3 **THE COURT:** Good afternoon. Would counsel identify
4 themselves.

5 **MS. LISS-RIORDAN:** Good afternoon, your Honor. For
6 the plaintiffs, Shannon Liss-Riordan, Hillary Schwab, and
7 Alex Sugerman with them.

8 **MR. PRESSMAN:** And for the defendants, Arthur
9 Pressman and Chris Mason, your Honor.

10 **THE COURT:** Good afternoon.

11 All right. Now, there really are two motions here,
12 the motion of the defendants to dismiss on jurisdictional
13 grounds and the plaintiffs' motion for class certification.

14 So let's hear the defendants briefly on the motion
15 to dismiss.

16 **MR. PRESSMAN:** Thank you, your Honor.

17 The motion to dismiss is brought on behalf of
18 Jani-King International and Jani-King, Inc., your Honor.
19 The evidence is clear that there is no allegation of any
20 representation by either of these defendants with respect to
21 any of the two class members or indeed any other putative
22 class member. Neither of these defendants is a party to the
23 franchise agreement. The fact that Jani-King International
24 may have drafted in Texas a franchise agreement that
25 subsequently gets used by other parties is not sufficient

1 for either general or specific jurisdiction. It's frankly
2 no different than if a law firm drafted in Texas or
3 elsewhere a franchise agreement and someone else used it.

4 The fact that some of the directors are the same
5 also is of no moment because the Court has a very high
6 regard for the corporate separateness of duly constituted
7 corporations, and there's no evidence that there's any
8 irregularity with respect to that.

9 **THE COURT:** Let me ask you this. Suppose, just for
10 discussion sake, that their motion for class certification
11 is allowed. Does that change things?

12 **MR. PRESSMAN:** I don't see that it does, your
13 Honor, to be honest. Jurisdiction is a threshold issue. If
14 indeed there's no jurisdiction, there is no jurisdiction.
15 And that supposition hopefully just doesn't --

16 **THE COURT:** Well, what I'm, what I'm thinking about
17 is, suppose so much of their motion for class certification
18 as depends upon their claim of unfair business practices.

19 Now, help me out here. How broad a class do you
20 want on that?

21 **MS. LISS-RIORDAN:** In this case we're seeking a
22 class of everyone in Massachusetts.

23 **THE COURT:** Just Massachusetts.

24 **MS. LISS-RIORDAN:** Yes.

25 **THE COURT:** Thank you.

1 **MS. LISS-RIORDAN:** Yes.

2 **THE COURT:** I appreciate your candor. All right.

3 And so, at most we're talking Massachusetts class
4 and you say --

5 **MR. PRESSMAN:** Right.

6 **THE COURT:** -- that doesn't reach your people.

7 **MR. PRESSMAN:** It doesn't. Because the franchisees
8 in Massachusetts only have contracts with Jani-King of
9 Boston.

10 **THE COURT:** Okay. I think, I think I understand.

11 Now, let's go on the motion to exercise personal
12 jurisdiction, and then we'll move from there into class
13 certification.

14 Yes, Ms. Liss-Riordan.

15 **MS. LISS-RIORDAN:** Yes. Your Honor, I believe we
16 have shown overwhelming evidence of Jani-King
17 International's involvement in relationships with the
18 Massachusetts franchisees and interrelationships with the
19 activities of Jani-King of Boston. I mean, essentially all
20 of this evidence we've put forth shows that Jani-King of
21 Boston acts as the regional office for Jani-King here in
22 Massachusetts. Eighty percent of the profits from the
23 franchise relationships go to Jani-King International.

24 **THE COURT:** But is it a piercing the corporate veil
25 argument? In essence, that these are really one entity. Is

1 that your argument?

2 **MS. LISS-RIORDAN:** They are essentially one entity,
3 yes.

4 **THE COURT:** And that's your argument.

5 **MS. LISS-RIORDAN:** Yes.

6 **THE COURT:** All right. Now, candidly, I grabbed
7 onto this case on the other end. I grabbed onto the class
8 certification end. I'm going to take this jurisdiction
9 under advisement. If my rulings on jurisdiction come back
10 to haunt me with respect to my rulings on class
11 certification, I'll revise that.

12 Now, on class certification. You've got two
13 approaches to class certification, unfair business practices
14 and then this employee classification. I think you're
15 stronger on the latter than the former, so why don't you
16 argue the former.

17 **MS. LISS-RIORDAN:** Certainly. The unfair business
18 practices?

19 **THE COURT:** Yes. And the problem is, and we've
20 faced this in like cases before, that it does seem to me
21 that you have to do an individual calculus about what
22 representations were made to what people and what reliance
23 there was, things like that.

24 **MS. LISS-RIORDAN:** Right. No, your Honor, we're
25 specifically not relying on that to certify the class under

1 93A and then the similar common law claims. Significantly,
2 93A does not require reliance. So, that's not a
3 consideration that should impede class certification with
4 respect to that claim. We are looking at the way the whole
5 franchise system operates much of which, if not all of
6 which, can be discerned from the franchise agreement itself.
7 We have multiple attacks on how it is unfair as spelled out
8 in the agreement. What people are signing here is a 20-year
9 agreement for which a promise is made to provide a certain
10 amount of cleaning work for a year. That itself we would
11 contend is an unfair business practice. People are putting
12 up thousands and thousands of dollars in order to obtain
13 cleaning work, and the cleaning work is promised in the
14 franchise agreement, because what people are buying is the
15 right to use monthly accounts.

16 Now, the way that Jani-King does not provide this
17 business is manifested in a whole lot of different ways.
18 They churn the accounts from one franchisee to another.
19 They take accounts away. They don't provide -- okay. But
20 what we've got --

21 **THE COURT:** I've read it. But now let me ask a
22 question.

23 **MS. LISS-RIORDAN:** Yes.

24 **THE COURT:** The contract may be uniform among the
25 class members, but the violation, the unfair business

1 practice would seem to be individualized. You say they
2 don't provide. Well, they may not have provided so much to
3 this person, but they provided some more to that person.

4 Do you see the difference?

5 **MS. LISS-RIORDAN:** Right. Which is why what we're
6 focused on, very significant is an attachment to the
7 affidavit of our lead plaintiff. It was submitted as an
8 exhibit to, the first exhibit in our motion for class
9 certification. We have a spreadsheet that was obtained from
10 the Jani-King of Boston office that lists all the
11 franchisees at the time, how much business they were
12 supposed to be getting per month and how much they were
13 actually getting. Not a single person on that list was
14 getting the amount of monthly business that they were
15 supposed to be getting.

16 So, our allegation is that Jani-King is selling
17 franchises that it doesn't have. It's collecting franchise
18 fees by promising business that it does not have enough
19 business in order to satisfy these guarantees that are being
20 made to people. That's the consistency. That's why, even
21 though it may be reflected differently in the way the
22 situation plays out with different franchisees, they're
23 selling something they don't have.

24 **THE COURT:** Do you agree that if I were to certify
25 a class on this theory it would be a class only for the

1 imposition of liability generally. There's going to have to
2 be individualized hearings about the extent of the damages
3 which would then go into what the shortfall was. If I
4 accept what you say.

5 **MS. LISS-RIORDAN:** Absolutely. And the law is
6 crystal clear from the First Circuit, of course, that
7 differences in damages, individualized inquiries on damages
8 should not defeat certification and there can be
9 mini-hearings, there are creative ways of resolving
10 individualized damages inquiries later.

11 And also the amount of business promised us, that's
12 one of the major allegations we have, but there are also
13 numerous complaints spelled out in our papers that can be
14 referenced by the agreement itself. There are fees,
15 excessive fees and deductions that are made from, as a
16 matter of course from the franchisees' checks which we
17 contend are 93A violations as well as violations of the
18 various common law --

19 **THE COURT:** It's going to have to be as matter of
20 course, correct?

21 **MS. LISS-RIORDAN:** Yes. Yes. And that's what
22 we're relying on, the ones that are done as a matter of
23 course.

24 **THE COURT:** If I were to go for this, I always try
25 to be transparent, and it may, since this is Judge Lindsay's

1 case, there's only one chance out of ten that I'm going to
2 be the judge who actually tries it, so I've got to be very
3 clear, if I even go for this, what I'm doing. And I don't
4 want you to get trapped. In my mind, if I go for it on some
5 uniform theory of liability and that's what makes the, the
6 class aspects predominate and warrants class treatment, then
7 you're not going to be able, as to liability, to get into
8 some individualized they made me a promise and didn't come
9 through.

10 You understand that? You recognize that?

11 **MS. LISS-RIORDAN:** I understand that. What we
12 would be focusing on for liability purposes are the common
13 course of dealing, the common course of conduct. Yes.

14 **THE COURT:** And all I'm saying back to you is it's
15 got, and I would have to search for some form of words, it
16 would have to be common course of dealing. So if there's
17 some -- let's say you've got plaintiff F, or class member F.
18 Now, class member F got royally shafted by this flagrant
19 misrepresentation which, however, is unique to class member
20 F. Class member F's in this, in this class. If I go for
21 this common course of dealing, we're never going to hear
22 class member F's flagrant misrepresentation because it's not
23 a common course of dealing.

24 Do you see the problem I'm trying to get at?

25 **MS. LISS-RIORDAN:** I think I see what you're

1 saying. But what I would suggest would happen would be the
2 evidence that we would be putting on would be, for instance,
3 the amount of business that Jani-King actually had, the
4 amount that was promised out to all the franchisees that it
5 currently has contracts for and it's shown in the --

6 **THE COURT:** See, I can see that as a damages
7 calculus. I understand that.

8 **MS. LISS-RIORDAN:** Right. But you --

9 **THE COURT:** My hypothetical is a -- I'm imagining
10 things your way here -- is a pretty flagrant 93A violation
11 that is not part of the common course of dealing, it's
12 individualized to class member F and G and H maybe. They're
13 going to lose that. Of course the benefit is they're going
14 to be part of a class. They're going to lose that because I
15 have only certified a class for liability -- even if I go
16 this far -- for liability purposes as to the common course
17 of dealing. See, if they had the wherewithal and they had
18 the skill of your firm and the like to try it, in the
19 individualized case with three plaintiffs those three could
20 testify to the flagrant violation of 93A. If I give you a
21 class and we're doing common course of dealing, you're up
22 there giving me the common course of dealing, but if it were
23 before me, I wouldn't receive evidence of the flagrant
24 misconduct with respect to F, G and H.

25 Are you following me?

1 **MS. LISS-RIORDAN:** Yes, I'm following what you're
2 saying. I mean, I suppose what we would hope to be able to
3 do at trial, but I understand what you're hearing, is be
4 able to have plaintiffs testify about how these common
5 course of dealings, their experience with a common course of
6 dealing. But I understand you're saying there would be some
7 restriction on what they could say about that.

8 **THE COURT:** There would be if I were the trial
9 judge. And all I can -- if I even go this far -- do is try
10 to craft fairly, because under 23(f), I mean one side or the
11 other can appeal here, so I've got to frame out what sort of
12 class I'm thinking about. All right, that's helpful.

13 Now, on class certification. The hardest thing for
14 you to resist is not this first one but it's the second, the
15 employee classification claim. As to that, it would seem
16 that that does seem, if I limit it to a Massachusetts class,
17 and I'm talking about the Massachusetts statutes, I have to
18 tell you my initial reaction is that that fits the class
19 certification requirements.

20 I'll hear you and then work on to unfair business
21 practices.

22 **MR. PRESSMAN:** Thank you, and I do want to come
23 back to respond to what Shannon said, your Honor.

24 With respect to the employee class there really is
25 no predominance of common issues. In fact, these employee

1 franchisees -- and to understand this, these are people who
2 buy a franchise after full disclosure with a Uniform
3 Franchise Offering Circular. They have a cooling off period
4 mandated by the Federal Trade Commission. They then decide
5 to buy a franchise. It is not at all surprising that the
6 franchise agreement is generally the same in terms but the
7 specific plan that each person buys and the time for which
8 that plan can be fulfilled is different from franchisee to
9 franchisee. The notion that Ms. Liss-Riordan would show
10 that on a certain day there was insufficient business to
11 serve an existing or set of franchisees as of that date
12 really shows that there's no understanding of what the
13 contract says. When I buy a Jani-King franchise, I buy the
14 right to be offered the opportunity to serve clients by
15 performing, Jani-King clients, under the Jani-King system
16 and proprietary marks, which right can be fulfilled over a
17 period of time from a minimum of 120 days to in some cases
18 440 days.

19 So, that means that even for the most modest plan I
20 buy, Jani-King has got 120 days to fulfill that plan. So,
21 just in terms of understanding what the contract says, I
22 think that the plaintiffs' allegations are really way off.

23 The fact that, for example, the contract is 20
24 years, virtually every franchise agreement written is for 10
25 years, 15 years, 20 years, some much longer, because people

1 make an investment when they buy a franchise and they wish
2 to amortize that investment. And in point of fact, the
3 typical, one of the representative plaintiffs, and two or
4 three of the affiants, buy their franchises not from
5 Jani-King but from another franchisee who has developed a
6 business and then seeks to harvest the equity that he or she
7 develops by selling it to somebody else. So, Ms. Barros
8 doesn't buy a franchise from Jani-King, she doesn't get any
9 representations from Jani-King, because she buys a franchise
10 from another franchisee that she's not even introduced to by
11 Jani-King. She's introduced to by a friend of hers who is a
12 franchisee who says this is a great idea, it's working great
13 for me, I would like you to do it. And so, there's
14 individualized inquiry really everywhere down the line, and
15 it includes the employment class which I understand was what
16 your Honor asked before I stood up.

17 The employment class requires an in fact
18 satisfaction, in fact analysis of what actually goes on.
19 The cases are clear that the common terms of the agreement
20 are not sufficient. And, in fact, the Coverall case which,
21 frankly, is the genesis for all of these cases, the Coverall
22 SJC case, in that case, the SJC refused to extend its
23 finding beyond the one employment claimant in that case.
24 And the facts of that case are radically different from any
25 of the facts presented by any of the affiants.

1 In that case, a woman was an employee of a
2 franchisee. Her franchisee boss quit his Jani-King
3 franchise for whatever reason.

4 **THE COURT:** Maybe you want to take just a few
5 minutes to talk about these unfair business practices --

6 **MR. PRESSMAN:** Sure.

7 **THE COURT:** -- claims. And you were following my
8 colloquy with Ms. Liss-Riordan. What do you have to say to
9 that?

10 **MR. PRESSMAN:** Well, with respect to the unfair
11 business practice, even though the cases say that reliance
12 isn't necessary in the classic way, your Honor has
13 recognized in the TJX case and other cases that reliance is
14 a necessary element in the link of causation and that is an
15 individualized inquiry, particularly when there are so many
16 different sources of information that get to a prospective
17 franchisee, not just the UFOC, not just the franchise
18 agreement which is given at least ten days in advance, but
19 also other franchisees, friends and neighbors and others,
20 plus the general reading that they do about franchising.
21 These are people who by and large already have jobs. Many
22 of them own businesses. What they're looking for -- own
23 other businesses. They're not unsophisticated. The
24 allegation is that we target unsophisticated non-English
25 speakers. There are college graduates. There are people

1 who do tax work for others.

2 **THE COURT:** All right.

3 **MR. PRESSMAN:** All of these people actually get
4 their information from a whole mix of different sources.

5 **THE COURT:** All right, here's what we're going to
6 do. The matter is sufficiently complex that it requires a
7 written opinion. But trying to be transparent, here's what
8 I think. I express no opinion on personal jurisdiction. I
9 take that under advisement. I'm not ready.

10 I think I'm likely to authorize a Massachusetts
11 class with respect to the employment classification. I
12 really need to reflect more on whether the class is going to
13 be any broader than that.

14 This case is Judge Lindsay's case. And it's not
15 yet been redrawn because really at my instance, and I
16 offered this, the Court has agreed that I'll handle his
17 cases up to the end of September and try to have them on a
18 track for trial.

19 So I recognize this is not my case. I'll write the
20 opinion on class certification. I'll make the determination
21 on personal jurisdiction. And if anyone wants to appeal
22 when they've seen it, do what you have to do.

23 Assuming that something is going to go forward, do
24 we have a case management order out there yet?

25 **MR. PRESSMAN:** We do.

1 **THE COURT:** And --

2 **MR. PRESSMAN:** We do.

3 **THE COURT:** All right. And that, that comes to
4 summary judgments when?

5 **MS. LISS-RIORDAN:** I believe those are this fall,
6 and we have a trial date next January.

7 **THE COURT:** That's fine. We'll leave that all the
8 same. And you will understand that as of the 1st of
9 October, I'll try to have all pending motions resolved. The
10 case as of the 1st of October will be randomly redrawn among
11 the judges then sitting in Boston.

12 **MR. PRESSMAN:** Your Honor, may I just place two
13 things on the record that I would just like to be clear.

14 **THE COURT:** Sure.

15 **MR. PRESSMAN:** One is, I would like to make sure
16 that your Honor saw the supplemental authorities, including
17 the Federal Express cases, both of which indicate that class
18 certification is inappropriate for employees that are --

19 **THE COURT:** You're arguing more. Yes, I've seen
20 them.

21 **MR. PRESSMAN:** Okay, fine. And the second --

22 **THE COURT:** And that's another reason --

23 **MR. PRESSMAN:** Okay.

24 **THE COURT:** -- why I'm taking it under advisement.

25 **MR. PRESSMAN:** And the second is, I just want to

1 make sure that with respect to the conflicts among class
2 members that you've considered the question, or you will
3 consider the question --

4 **THE COURT:** You're again arguing. I'm taking it
5 under advisement.

6 **MR. PRESSMAN:** Thank you, your Honor.

7 **THE COURT:** I've told you as much as I can tell you
8 and when I enter my order it will be entered.

9 Thank you.

10 **MR. PRESSMAN:** Thank you.

11 **MS. LISS-RIORDAN:** Thank you, your Honor.

12 (Whereupon the matter concluded.)
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C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for
the United States District Court for the District of
Massachusetts, do hereby certify that the foregoing pages
are a true and accurate transcription of my shorthand notes
taken in the aforementioned matter to the best of my skill
and ability.

/S/ DONALD E. WOMACK 2-2-2010

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